(13)

No. 93-6497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,

Petitioner,

—v.—

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TEXAS IN SUPPORT OF PETITIONER

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ISSUE PRESENTED

Does a United States district court have authority to stay the execution of an unrepresented state prisoner during the time required for the court to appoint counsel and for counsel to prepare a meaningful federal habeas corpus petition attacking the constitutionality of the death sentence?

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU steadfastly maintains its opposition to the use of capital punishment in the United States. Chief among our concerns are the due process and equal protection problems that are rampant in the administration of the death penalty. These concerns prompted the creation of the ACLU Capital Punishment Project which, among other things, is dedicated to eliminating denials of due process in capital cases and to educating the public about the serious moral and legal questions that the death penalty raises. The ACLU of Texas is a state affiliate of the national organization.

This case presents a series of issues of direct and longstanding concern to the ACLU, including: the importance of fair procedures if the death penalty is ever to be imposed; the importance of federal habeas review, especially in a death penalty context; and the significance of counsel for indigent petitioners who are otherwise unable to preserve and protect their constitutional rights within the criminal justice system.

The party briefs in this case focus on the narrow question of whether the Habeas Corpus Act and the All-Writs Act authorize a federal district court to stay a scheduled execution while counsel is appointed to prepare a formal habeas corpus petition. The ACLU agrees with petitioner that the answer to that question must be yes. In addition, however, this brief focuses on the central role played by federal habeas corpus in capital cases, and the crucial responsibilities of competent counsel in the representation of capital clients.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

On November 15, 1989, the petitioner, Frank McFarland, was convicted of capital murder and sentenced to death in a Texas state court. On September 23, 1992, the Texas Court of Criminal appeals affirmed the conviction and sentence on direct review. On June 6, 1993, this Court denied *certiorari*. Two months later, on August 16, 1993, the trial judge issued an order fixing an execution date for September 23, 1993, then less than a month away. The following day, the trial court postponed the execution for an additional month -- to October 27, 1993.

At that time, the petitioner had not yet exercised his right to seek postconviction relief from the Texas state courts. Nor had he filed an application for a federal writ of habeas corpus. He had been represented by counsel at trial, on direct review, and in *certiorari* proceedings in this Court. Thereafter, however, counsel had abandoned him. McFarland had no lawyer when the trial court scheduled his execution and, except for the emergency assistance provided by the Texas Resource Center, he has had no lawyer since.

When his execution date was set, the petitioner literally took his life in his own hands. He initially filed several *pro se* motions in the Texas state courts, seeking a stay of execution to allow time for a lawyer to be secured to represent him. When those efforts were unsuccessful, he wrote to the United States District Court for the Northern District of Texas, expressing his desire to seek federal habeas corpus relief and requesting a stay and the appointment of counsel to make that possible.[2] The district court denied a stay, declined to appoint

[2] McFarland acknowledged that he had obtained help from the Texas Resource Center in the preparation of this request, but explained that the Resource Center could not assume formal responsibility for his case because of the overflow of death penalty cases in Texas.

counsel, and refused even to issue a certificate of probable cause to permit the petitioner to appeal. When the prisoner renewed his request for a certificate before the Fifth Circuit, a panel of that court, too, denied relief and further held that the district court lacked authority to stay an execution in advance of a formal habeas corpus petition. *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993).

The Fifth Circuit decision on the question of judicial authority conflicted with a previous Ninth Circuit decision on the same point. *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992). This Court granted *certiorari*.

SUMMARY OF ARGUMENT

Contrary to the view of the Fifth Circuit below, two federal statutes clearly authorize a district court to issue a stay of execution in advance of a formal habeas corpus petition. First, the Habeas Corpus Act, 28 U.S.C. §2251, explicitly authorizes a stay when a habeas "proceeding" is "pending" and the most natural understanding of the term "pending" in these circumstances would embrace a request by a *pro se* petitioner for the appointment of counsel to help seek habeas relief. Second, the All-Writs Act, 28 U.S.C. §1651, empowers a district court to issue a stay in order to protect its prospective jurisdiction in habeas corpus.

Any doubts about the proper construction of §2251 and §1651 are resolved by a provision of the Anti-Drug Abuse Act of 1988, 21 U.S.C. §848(q)(4)(B), which obligates the federal government to provide an indigent death row prisoner with appointed counsel in a federal habeas corpus proceeding. In cumulative effect, all three statutes together can only be read to mean that a district court has authority to prevent an execution so that a potential habeas applicant can be represented by a lawyer for purposes of a federal habeas attack on a death sentence.

The simplest and most straightforward way to accomplish that result is for the district court to stay the execution date, where appropriate, to allow time for the appointment of counsel and the preparation of a professionally competent habeas corpus petition. In the alternative, a district court may either treat a prisoner's *pro se* request for a stay and counsel as a petition for habeas corpus relief or invite the prisoner to file a place-holding petition for the writ.

If this Court prefers one of those alternatives, however, it must instruct the lower courts that such a petition-for-convenience is not to be treated as a formal petition presenting the merits of the prisoner's claims. Specifically, a district court must postpone the application of any rules calling for expedited consideration of habeas petitions in capital cases, the ordinary procedural rules governing habeas petitions (*e.g.*, the exhaustion and procedural default doctrines), and any threshold examination of the merits. All those matters should be taken up only after counsel has been appointed and has had an opportunity to file a meaningful federal application presenting and supporting all nonfrivolous claims.

If client and counsel conclude that it is best to pursue relief in state court before filing a federal petition, counsel will presumably seek a stay from the state courts. If no such stay is forthcoming, however, the federal district court's stay must remain in effect to ensure that the district court's prospective jurisdiction to entertain a timely federal petition is preserved. If client and counsel choose to file a federal petition without further recourse to the state courts, the stay must remain in place during the proceedings on that petition. The usual procedural rules governing formal applications for federal habeas corpus relief will then be applicable to the petition that counsel files on the prisoner's behalf.

In either event, a death row inmate should not be required to go it alone. The unique importance of com-

petent, professional representation in death penalty cases has been recognized by this Court for more than a half-century. *See Powell v. Alabama*, 287 U.S. 45 (1932). And as Congress recognized when it enacted §848, competent counsel is equally essential when a death row inmate seeks federal habeas relief. This is especially true given the procedural rules that this Court has imposed on habeas corpus in recent years. An uncounseled petitioner's failure to comply with those rules can often be fatal.

The jurisdictional context in which this case arises should not obscure what is really at stake. The success rate for habeas petitions in capital cases is approximately 40%, an extraordinarily high figure that attests to the importance of habeas corpus in the machinery of American justice. This Court, like Congress, has often acknowledged as much. Thus, even when enforcing new procedural rules, the Court has never questioned the clear intent of Congress to give the district courts authority to adjudicate the merits of properly preserved and presented federal claims.

The denial of a district court's authority to issue a pre-petition stay in a proper case would, however, undermine the substance of the federal habeas jurisdiction. For in the absence of a stay and competent counsel, a death row inmate cannot hope either to clear the procedural barriers to the federal forum or to develop and present what may be meritorious constitutional claims.

If the constitutional limits on capital punishment are to be effectively enforced in federal habeas corpus with the assistance of competent lawyers for indigents as Congress has prescribed, then it must follow that the federal district courts have authority to stay executions when necessary to summon counsel to service and to allow counsel actually to render service -- to prisoners on death row, to the federal courts, and to the Constitution of the United States.

ARGUMENT

I. A DISTRICT COURT HAS AUTHORITY TO STAY THE EXECUTION OF AN UNREPRESENTED STATE PRISONER DURING THE TIME REQUIRED FOR THE COURT TO APPOINT COUNSEL AND FOR COUNSEL TO PREPARE A MEANINGFUL HABEAS CORPUS PETITION

The district court's authority to stay a prisoner's execution in the circumstances of this case rests on three related federal statutes. First, the Habeas Corpus Act, specifically 28 U.S.C. §§2241, 2254, and 2251, establishes the court's subject matter jurisdiction in habeas corpus and expressly provides for stays to effectuate that jurisdiction. Next, the All-Writs Act, 28 U.S.C. §1651, authorizes the court to issue all writs "necessary or appropriate in aid of [its] respective jurisdictions and agreeable to the usages and principles of law." Finally, a provision of the Anti-Drug Abuse Act of 1988, 21 U.S.C. §848 (q)(4)(B), entitles an indigent state prisoner to the appointment of "one or more attorneys" for purposes of a habeas corpus proceeding pursuant to §2254 "seeking to set aside a death sentence."[3]

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[3] This brief does not explore the petitioner's arguments that he is constitutionally entitled to appointed counsel in this death penalty case and that the state courts of Texas violated the Suspension Clause by failing to stay the petitioner's execution in order to permit at least one postconviction petition to be prepared and heard.

In our view, however, it would be unconstitutional for Texas to put the petitioner to death without pausing to consider whether appointed counsel might develop meritorious claims that such an execution would violate federal law. *Cf. Barefoot v. Estelle*, 463 U.S. 880, 888 (1983)(stating that a death sentence "cannot begin to be carried out . . . while substantial legal issues remain outstanding"); *Murray v. Giarratano*, 492 U.S. 1, 14-15 (1989)(Kennedy & O'Connor, JJ., concurring)(expressing an unwillingness to hold that Virginia must appoint (continued...)

These statutes plainly contemplate that a district court has power to maintain the *status quo* long enough to make the system work -- that is, long enough to secure a lawyer to represent a death row prisoner and to give that lawyer sufficient time to investigate the case, marshal claims and supporting facts, and prepare and file a meaningful petition for the court's examination. To read the statutes otherwise is to read them to produce an absurd result.

A. The Plain Meaning of §2251 and §1651

The Court need go no further than the bare language of §2251 and §1651 to conclude that the district court in this case had all the authority necessary to stay

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[3] (...continued)
counsel to represent indigent death row prisoners in state postconviction proceedings -- but only where the record showed that the less sweeping system that state employed had managed to produce a lawyer for everyone who requested one).

The parties in this case do not explicitly ask the Court to revisit the issue in *Giarratano*, 492 U.S. 1. This brief, too, eschews a forthright assault on the decision in that case, namely that a state has no absolute duty to provide indigent death row prisoners with lawyers for purposes of *state* postconviction proceedings. This case does, however, illuminate the calamitous consequences of the *Giarratano* decision in states, like Texas, which do not provide lawyers in state proceedings.

The Court must, however, approach the statutory construction question at bar within the constitutional context from which it arises. Four members of this Court dissented from the plurality's judgment in *Giarratano* and *would* have held that "it is fundamentally unfair to require an indigent death row inmate to *initiate* collateral review without counsel's guiding hand." *Id.* at 20 (Stevens, J., dissenting)(joined by Blackmun, Brennan & Marshall, JJ.)(emphasis added). Federal habeas corpus is such a "collateral" remedy, and if Congress had not established a right to counsel in federal court via §848 there would be a powerful argument that a district court would be constitutionally obliged to appoint one anyway -- at least in a case like this one, in which the relevant state has failed to supply counsel for state postconviction proceedings.

McFarland's execution in advance of a formal application for habeas corpus relief.

By the terms of §2251, a federal judge or justice "before whom a habeas corpus proceeding is pending" may stay "any proceeding against the person detained . . . under the authority of any state . . . ." The circuit court held that a "habeas corpus proceeding" is "pending" only after a formal petition is filed. That construction defies a much more natural and sensible reading, namely that a "habeas corpus proceeding" is "pending" when a *pro se* prisoner brings his or her allegedly unconstitutional custody to the district court's attention and announces a genuine intention to seek habeas relief.[4]

The point of a stay of execution pursuant to §2251 is to protect the district court's ability to exercise its habeas jurisdiction under §§2241 and 2254. As long as a prisoner clearly indicates an intention to file a formal habeas petition, there is no basis for barring a stay prior to such a petition while permitting a stay immediately thereafter. When a case is in either posture, the same need for a federal stay obtains.

By the terms of §1651, a federal court has authority to issue all writs "appropriate in aid of [its] . . . jurisdiction[]." Here, too, the plain purpose is to allow a federal court to issue ancillary orders that make it possible to exercise some independent basis of subject matter jurisdiction -- like habeas corpus.[5] In some cases, such writs

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[4] The term "pending" means not only "during," but also "while awaiting," and is synonymous with "imminent" or "impending." WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993). *Accord* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987); WEBSTER'S NEW WORLD DICTIONARY (original copyright 1957).

[5] In *United States v. New York Telephone Co.*, 434 U.S. 159, 188 n.19 (1977), Justice Stevens recognized that §1651 is not a freestanding jurisdictional statute, but rather piggybacks on some independent juris-
(continued...)

may issue after a formal proceeding has commenced in federal court. In other cases, however, a federal court may act before a formal complaint is filed in order to preserve its ability to exercise jurisdiction in due course. *See FTC v. Dean Foods*, 384 U.S. 597, 603 (1966)(holding that a court of appeals can issue the writ of mandamus to protect its potential jurisdiction to review the actions of an administrative agency); *McClellan v. Carland*, 217 U.S. 268, 280 (1910)(holding that an appellate court can issue the writ of mandamus to protect its potential jurisdiction to review the judgment of a lower court).[6]

It makes no difference that the federal courts most often rely on §1651 to protect a prospective jurisdiction in the form of an appeal from the judgment of a lower federal court or federal agency. The federal courts do not *have* any potential appellate jurisdiction with respect to matters in state court and therefore have no occasion to protect any such jurisdiction.[7] The federal courts do, however, have jurisdiction to entertain habeas corpus applications after prisoners' federal claims have been rejected by the state courts and thus may well need to is-

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[5] (...continued)
dictional base. That is quite correct. Yet the independent jurisdictional ground may be either currently engaged or prospective.

[6] In other contexts, the Fifth Circuit itself has recognized this well-settled understanding of the Act. *E.g.*, *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 n.19 (5th Cir. 1978)(acknowledging that the All-Writs Act authorizes a court to preserve the status quo in order to be in a position to exercise jurisdiction later). The petitioner cites a host of other circuit decisions to the same effect.

[7] *See* 28 U.S.C. §1738 (normally obligating a federal court to give preclusive effect to a previous state court judgment); *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923)(confirming that the lower federal courts have no appellate jurisdiction over state court decisions).

sue stays to protect that jurisdiction from disruptive state action.[8]

As the petitioner points out, this Court's own practice of staying executions so that prisoners can file formal *certiorari* petitions reflects the settled understanding that a federal court may forestall a state execution in aid of prospective federal jurisdiction [9]

B. The Cumulative Effect of §2251, §1651, and §848

If the Court finds ambiguity in §2251 and §1651, it must read those statutes "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law . . . [and thus] to make sense rather than nonsense out of the *corpus juris*." *West Virginia University Hosp. v. Casey*, 499 U.S. __, __, 111 S.Ct. 1138, 1148 (1991).

In this instance, the Court can scarcely read §2251 and §1651 to mean something apart from §848 that they cannot possibly be read to mean if considered in light of the right-to-counsel statute. Congress has decided that the federal government should provide indigent death row prisoners with lawyers to represent them in federal habeas corpus proceedings. It is untenable to propose, then, that prisoners may be denied attorneys anyway -- because the federal courts have no power to keep prisoners alive long enough to enjoy the benefits of professional counsel. It is equally untenable to propose that a prisoner who is fortunate enough to survive must still proceed *pro se*, despite §848 -- because a formal petition must be docketed *before* a district court can issue an order appointing a lawyer. Certainly, it is inconceivable that §848 commands the appointment of counsel only after a formal petition has been filed, when it is too late for a lawyer actually to *represent* the client by preparing the case for federal adjudication.[10]

Once a formal petition is filed, the die is cast and the best of lawyers can often do little to affect the proceedings. The prisoner's *pro se* errors may already have frustrated any meaningful day in federal court that might otherwise have been possible. In Texas today, a federal district court can deny a stay of execution and dismiss an *initial* habeas corpus petition on the merits within the space of a single day.[11]

It is no answer, of course, that §848 is a comparatively new enactment, while §2251 and §1651 have been in place for a very long time. Once again, the Court's responsibility is to construe all three statutes as part of a consistent whole. It is pointless to guess at whether the Congresses that put the Habeas Corpus Act and the All-Writs Act on the federal statute books "intended" at the

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[8] *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 n.27 (1982) (confirming that habeas corpus is an express statutory exception to §1738); *Brown v. Allen*, 344 U.S. 443 (1953)(confirming the federal courts' authority to reexamine prisoners' federal claims as a sequel to state court litigation).

[9] The Anti-Injunction Act, 28 U.S.C. §2283, which often restricts the availability of federal injunctions against state proceedings, expressly accommodates the All-Writs Act by recognizing an exception for "an injunction to stay proceedings in a State court . . . where necessary in aid of [a federal court's] jurisdiction . . . ." *Cf. Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 640 (1977)(recognizing that §2251 is an express statutory exception to §2283).

[10] In this vein, §848(q)(4)(B) expressly provides that appointed counsel is entitled to "investigative, expert, or other" support services. That plainly contemplates that counsel is to assist in the development of the prisoner's claims, not simply to appear in court once a *pro se* application has been filed.

[11] *E.g., Gosch v. Collins*, No. SA-93-CA-731 (W.D.Tex. Sept. 15, 1993), *aff'd*, 8 F.3d 20 (5th Cir. 1993), *petition for cert. filed*. *See* pp.15-16, *infra* (discussing the possibility that newly appointed counsel might amend a *pro se* application).

time to authorize the kind of stay that is essential in this case if §848 is to have any effect.[12] All three statutes are now part of the aggregate of federal statute law, and this Court must make sense of them as a unit.[13]

After an examination of the statutory system in 1989, Justice Powell's *ad hoc* committee of the Judicial Conference concluded that the working assumption behind the habeas system that Congress has created should be simply this:

> [E]very state prisoner under capital sentence should have one opportunity for full state *and federal* post-conviction review before being subject to execution.[14]

In aid of this general policy, the Powell Committee offered a number of recommendations. One of the most important (and least controversial) was that a federal district court "that *would* have jurisdiction" over a habeas corpus application on behalf of a death row prisoner should automatically stay the prisoner's execution as

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[12] *See Pennsylvania v. Union Gas*, 491 U.S. 1, 30 (1989)(Scalia, J., concurring and dissenting)(explaining that the task is not to identify the legislative "intent" that a particular Congress had in mind when it enacted a particular statute, but to "give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times").

[13] In *Califano v. Sanders*, 430 U.S. 99 (1977), the Court held that §10 of the Administrative Procedure Act does not constitute an independent basis of subject matter jurisdiction. There were arguments both ways, but the Court found it persuasive that a recent amendment to 28 U.S.C. §1331 would be undercut if the APA were read to be jurisdictional in itself. If a more recent enactment can weaken an argument that a longstanding statute is jurisdictional, a recent enactment can equally strengthen such an argument.

[14] Judicial Conference of the United States, *Ad Hoc* Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 15 (1989)(emphasis added).

soon as the prisoner seeks such a stay after an execution date is fixed.[15] Importantly, the Powell Committee did not suggest that new legislation would be required to empower a district court to issue a stay of execution in advance of a formal habeas petition.[16]

There is no basis for referring in this case to the Court's general practice of reading jurisdictional statutes narrowly, even when justice would better be served by a more generous construction. *E.g.*, *Christianson v. Colt*, 486 U.S. 800 (1988). The reason for that prudential policy is that the federal courts have only the power that Congress confers on them and should not risk exercising authority that Congress has not genuinely granted. In this case, however, there is no doubt that the federal courts have jurisdiction in habeas corpus. That jurisdic-

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[15] *See* n.14, *supra* at 13-14 (emphasis added). Within the Powell Committee's program, a district court would have this duty (and a variety of others) if the state concerned first triggered the application of special death penalty provisions by appointing counsel for purposes of *state* postconviction proceedings. *See id.* at 7:

> [T]he [recommended] statute provides for an automatic stay of execution, which is to remain in place until federal habeas proceedings are completed, or until the prisoner has failed to file a petition within the allotted time. This automatic stay ensures that claims need not be evaluated under the time pressure of a scheduled execution. It should substantially eliminate the rushed litigation over stay motions that is troubling for both litigants and the judiciary.

[16] The Committee said nothing about jurisdiction and quite clearly presupposed the necessary baseline authority to issue stays. The only innovation the Committee purported to advance in its recommendation on stays was that the district courts should issue them routinely in all cases -- whether counsel is involved or not, and without any threshold consideration of facial merit. Other aspects of the Committee's plan plainly would require legislation, *e.g.*, new filing deadlines for capital habeas petitions. When, accordingly, the Committee put all its recommendations together in a single package, it was efficient to present that package in the form of a legislative bill.

tion is clear and settled.[17]

A pre-petition stay need not delay the filing and processing of a formal federal habeas corpus application. The district court can specify the time it will require to identify and appoint counsel under §848. Once counsel is involved, the court can specify the time it will allow for the investigation and preparation of the prisoner's claims. Cases in which stays are issued will not, then, disappear in the interstices of the system. By contrast, once the federal court issues a stay order, it can assert control of a case, track its progress, and ensure that appointed counsel develops and presents the prisoner's claims as soon as practicable. In other circuits, district courts now stay executions in these circumstances only for fixed periods of time and then monitor events to avoid abuses. *E.g.*, *Brown v. Vasquez*, 952 F.2d at 1165. The district courts in the Fifth Circuit can do the same.

C. Alternatives to a Pre-Petition Stay

A stay in advance of a formal habeas corpus petition is not the only answer in cases of this kind. Alternatively, a district court can either treat a prisoner's request for counsel and a stay as a formal habeas petition,[18] or (quickly) invite the prisoner to submit a pleading that is formally styled a petition for the writ.[19] Either way, the

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[17] The norm of narrow construction is primarily invoked when jurisdiction over parties, rather than claims, is in issue. *E.g.*, *Finley v. United States*, 490 U.S. 545 (1989). Here, of course, Texas is contending against jurisdiction over *federal claims*.

[18] *See Haines v. Kerner*, 404 U.S. 519, 520 (1972)(admonishing the district courts to hold *pro se* papers to "less stringent standards than formal pleadings drafted by lawyers").

[19] *Cf. United States v. Shipp*, 203 U.S. 563, 573 (1906)(Holmes, J.)(recognizing that a federal court always has power to entertain a matter in order to determine whether it has some basis of subject matter jurisdiction).

court would clearly have authority to issue a stay and any argument to the contrary would melt away.

If, however, this Court chooses one of these alternatives, it is vital that it be clear that such a petition-for-convenience cannot be subjected to the panoply of procedural rules that typically bear on genuine habeas applications. It would be senseless to *treat* a stay request as something it is not (a substantive habeas petition) merely to gain some formalistic reassurance of the court's jurisdiction, and then to *demand* of such a petition what it cannot reasonably supply (an effective presentation of all the prisoner's nonfrivolous claims).[20]

Instead, if the Court prefers one of these routes, it must make it plain that such a petition would be open to liberal amendment by appointed counsel and that amendments would not run afoul of the ordinary rules governing successive habeas applications.[21] In effect, the

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[20] Tragically, this is precisely what can now occur in the Fifth Circuit. *E.g.*, *Gosch v. Collins*, *supra* n.11.

[21] *McCleskey v. Zant*, 499 U.S. __, 111 S.Ct. 1454 (1991). The point of the *McCleskey* rules is to give prisoners and their lawyers a strong incentive to aggregate all claims in a single application for federal relief. Ever since *McCleskey* was decided, lawyers have known that they must scour the state record and employ any other devices at their disposal to isolate all nonfrivolous claims to be included in the prisoner's first (and potentially last) federal habeas petition. *See Coleman v. Vasquez*, 771 F.Supp. 300, 302 (N.D.Cal. 1991)(reviewing the investigative work that *McCleskey* demands of prisoners and their lawyers). If, however, a would-be petitioner has no lawyer to do that crucial work, the incentive structure established in *McCleskey* breaks down.

If prisoners like McFarland are forced to file *pro se*, they will often fail to articulate all the claims open to them and thus run squarely into *McCleskey*. If, then, claims raised by way of amendment are treated as successive, something has to give -- either the rigidity of the forfeitures that *McCleskey* envisions or the federal interest in the adjudication of a prisoner's constitutional claims. If it is the latter, then the federal judicial machinery that Congress has established to enforce

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prisoner's own *pro se* filing must be considered only a place-keeper -- to be displaced entirely by a professionally prepared petition filed later by appointed counsel.

Specifically, if the Court chooses one of these alternative routes, it should give district courts three explicit instructions. First, they must defer the application of any local rules they may have for the summary examination of habeas petitions on an expedited basis until counsel has been able to file a meaningful application on the prisoner's behalf. This Court has approved truncated procedures in capital cases only with the understanding that the prisoners concerned have competent counsel to assist them. *See Barefoot v. Estelle*, 463 U.S. 880. That, of course, would not be the case if a district court treated a *pro se* request for counsel and a stay as substantive application for habeas relief.

Second, the district courts should similarly defer any appraisal of the prisoner's compliance with the procedural requirements in habeas corpus -- for example, the exhaustion doctrine and the rules governing procedural default in state court. One of the chief objectives of providing counsel to assist in the preparation stage is to make it possible for prisoners to comply with those doctrines. It only makes sense, then, that a district court should withhold judgment until an appointed lawyer has done his or her job.

Third, the district courts certainly must postpone any consideration of the facial merits of a prisoner's substantive claims until counsel has tendered those claims in a new or amended petition. It would be absurd for a district court to ensure its jurisdiction to pass on constitutional claims by seizing upon the first piece of paper a

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[21] (...continued)
the Bill of Rights in capital cases will be frustrated by a futile system of penalties, imposed on state prisoners for failing to do what they have no genuine capacity to do.

pro se prisoner sends along and then, in the next breath, to dismiss on the merits because that piece of paper fails to allege a substantial constitutional violation.[22] A *pro se* request for counsel and a stay is not meant to advance substantive claims and can scarcely be faulted for failing to do so.[23]

II. A PRE-PETITION STAY IS ESSENTIAL TO THE CONGRESSIONALLY PRESCRIBED POLICY OF PERMITTING A STATE PRISONER TO ATTACK A DEATH SENTENCE IN FEDERAL HABEAS CORPUS WITH THE ASSISTANCE OF A COMPETENT LAWYER

Since the Court ended the moratorium on capital punishment in 1976, the Court has interpreted the Eighth and Fourteenth Amendments to place serious substantive and procedural limitations on the content and implementation of state death penalty statutes.[24]

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[22] Thus *Autry v. Estelle*, 464 U.S. 1 (1983), is inapplicable to such an initial filing by a *pro se* prisoner. In that case, there was no question that the prisoner was represented by competent counsel, and this Court could sensibly examine the substance of the allegations to decide whether *certiorari* might conceivably be granted.

[23] Similarly, if the Court were to hold that a district court may appoint counsel as soon as a prisoner files a request pursuant to §848 and that *counsel* should immediately file a habeas petition, that petition should not be subject to the same expedited procedures and the same threshold examination for compliance with procedural rules and substantive merit that would apply to a petition filed after counsel has had a fair opportunity to perform his or her function as outlined above. A *pro forma* petition, irrespective of its label and author, cannot sensibly be held to the standards this Court has established for genuine applications for habeas relief advancing particularized federal claims. *Cf. Gosch v. Collins*, *supra* n.11 (illustrating the unfairness of any such procedure).

[24] *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Without those limitations, sentencing authorities would exercise uncontrolled discretion and fail to take account of a defendant's peculiar circumstances. So long as the death penalty retains constitutional approval in any form, its use must be subject to guidelines that safeguard the values served by the ban on cruel and unusual punishment. In consequence, however, death penalty law is extraordinarily complex and demanding.

Congress has recognized the complexities of death penalty doctrine and the consequent need for effective machinery to enforce it. And Congress has responded by opening the federal habeas courts for the adjudication of prisoners' federal claims and by providing for publicly funded lawyers to make habeas litigation meaningful. Similarly, this Court has frequently recognized the absolute necessity of skilled assistance in capital cases. *E.g.*, *Murray v. Giarratano*, 492 U.S. at 14 (Kennedy & O'Connor, JJ., concurring)(explaining that the complexity of death penalty jurisprudence "makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law").

To represent a capital client in habeas corpus, a lawyer must probe the intricacies of a whole series of doctrines -- among them the Eighth Amendment principles governing capital trials and sentencing proceedings and the rules governing the effect of previous proceedings in state court.[25] Substantive Eighth Amendment standards are extremely complex and dynamic, presenting even an experienced member of the criminal defense bar with a

[25] *See generally* American Bar Association Criminal Justice Section, Report to the House of Delegates, *reprinted in* 40 Am.U.L.Rev. 9, 55 (1990); Robson & Mello, "Ariadne's Provisions: A 'Clue of Thread' to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty," 76 Calif.L.Rev. 89 (1988).

significant professional challenge.[26] The "learning curve" is all the more significant for a volunteer attorney, who may have experience only in civil litigation and thus be unfamiliar even with general principles of criminal procedure. Certainly a *pro se* prisoner is typically unable to master the substantive law affecting his or her sentence. The procedural prerequisites for a successful habeas petition are also intricate.[27] A lawyer can explore them only with time and effort; a *pro se* death row prisoner cannot hope to pursue them at all.[28]

To grasp the demands of counsel's responsibilities, one need only consider the tasks a lawyer faces in turn. Initially upon appointment under §848, counsel must consult with the new client and the attorneys who represented him or her previously, study the record of the proceedings in state court and all existing briefs, memoranda, and judicial opinions touching the case, and explore the federal claims previously advanced on the client's behalf.

[26] This Court has often developed idiosyncratic or hybrid principles for application only when the death penalty is invoked. *E.g.*, *Wainwright v. Witt*, 469 U.S. 412, 414 (1985)(jury selection); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(argument to the jury); *Spaziano v. Florida*, 468 U.S. 447, 464-65 (1984)(sentencing responsibility).

[27] *E.g.*, ABA Report, *supra* at 29-30 n.49.

[28] In many cases, moreover, the effectiveness of previous counsel must be evaluated -- a daunting affair, even for professionals. Under *Strickland v. Washington*, 466 U.S. 668 (1984), it is necessary to determine whether a lawyer's performance "fell below an objective standard of reasonableness," *id.* at 688, and, if so, whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A death row prisoner acting alone simply cannot develop arguments with respect to these intrinsically professional matters. *See Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986)(acknowledging that a prisoner may appreciate a lawyer's shortcomings only after consulting a different attorney).

In addition, counsel must investigate any basis there may be for raising other, additional federal issues. For this, counsel cannot rely on the record in state court, but must independently investigate factual circumstances that may reveal meritorious federal claims.[29] Death row prisoners frequently obtain relief because new lawyers, appointed after direct appeal is complete, have developed extra-record evidence of constitutional error.[30] In some instances, habeas counsel have uncovered evidence raising serious doubts about death row inmates' factual guilt.[31] In any event, a competent professional can file a

[29] *Cf. Penson v. Ohio*, 488 U.S. 75, 82 n.5 (1988)(recognizing that the record at trial in state court may not reveal all the irregularities that may support claims for relief); *Amadeo v. Zant*, 486 U.S. 214 (1988) (recognizing that a prisoner had been unaware of a race discrimination claim until habeas counsel uncovered it by examining the evidence in another lawsuit).

[30] At the very least, counsel must determine whether state authorities failed to disclose exculpatory material, *e.g.*, *McDowell v. Dixon*, 858 F. 2d 945 (4th Cir. 1988); *Lewis v. Lane*, 832 F.2d 1446 (7th Cir. 1987), *cert. denied*, 488 U.S. 829 (1988); *Bowen v. Maynard*, 799 F.2d 593 (10th Cir.), *cert. denied*, 479 U.S. 962 (1986); *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986); *Chaney v. Brown*, 730 F.2d 1334 (10th Cir.), *cert. denied*, 469 U.S. 1090 (1984), and whether trial counsel turned up all the defenses and claims open to the accused. *E.g.*, *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991); *Pilchak v. Camper*, 935 F. 2d 145 (8th Cir. 1991); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991); *Chambers v. Armontrout*, 885 F.2d 1318 (8th Cir. 1989); *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988); *Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988); *Smith v. Wainwright*, 799 F.2d 1442 (11th Cir. 1986); *Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986); *Ruffin v. Kemp*, 767 F. 2d 748 (11th Cir. 1985); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985); *House v. Balkcom*, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984). Most federal decisions holding trial counsel to have been constitutionally ineffective have been based on recently discovered evidence. *E.g.*, *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988); *Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987); *Thomas v. Kemp*, 796 F.2d 1322 (11th Cir. 1986).

[31] *E.g.*, *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985); *White v. Estelle*, (continued...)

petition only after a thorough search for all nonfrivolous claims available to the client.

Next, counsel must assess the procedural posture of any potentially meritorious claims that come to light and explain to the client the avenues for pursuing those claims. In some instances, further recourse to the state courts may be advisable;[32] in others, an immediate habeas application in federal court may be appropriate.[33] Finally, counsel must give the client the best professional advice he or she can offer -- including an assessment of the risks of choosing any particular course of action.[34]

[31] (...continued)
685 F.2d 927 (5th Cir. 1982); *Freeman v. Georgia*, 599 F.2d 65 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *McDowell v. Dixon*, 858 F.2d 945.

[32] For example, counsel may conclude that state remedies have not been exhausted with respect to a claim and that there is some currently available mechanism by which to present the claim to the state courts. If a claim was not, but should have been, raised in state court at an earlier time, it is possible that the state courts would now refuse to consider it in light of previous counsel's procedural default. Nevertheless, the state courts may be willing to overlook such a default and reach the merits after all -- perhaps in a new state postconviction procedure. Counsel must explore these possibilities and contingencies and advise the client accordingly.

[33] For example, counsel may conclude that state remedies have been exhausted or that, if previous counsel's procedural default did or would bar further litigation in state court, the federal court should either find the state's procedural ground of decision inadequate to cut off federal habeas corpus or should find the "cause" and "prejudice" necessary to warrant federal adjudication on the merits notwithstanding that procedural ground. Alternatively, counsel may reach an understanding with opposing counsel to waive state defenses on the basis of the exhaustion or procedural default doctrines.

[34] For example, counsel must explain to the prisoner that a decision to go forward immediately in federal court with claims regarding which state remedies have been exhausted, and to postpone the presentation of claims regarding which state remedies have not been exhausted, is (continued...)

If the prisoner and counsel decide to seek relief from the state courts, counsel has a professional obligation either to handle that matter for the prisoner or to see that alternative representation is secured.[35] If and when such a state petition is filed, the appropriate state court will presumably issue a stay of execution for its own purposes.[36] If, however, the state court refuses, the federal district court's previous stay must remain in effect -- in order to protect that court's potential jurisdiction to consider the prisoner's federal claims when they are presented in a formal federal habeas petition.

If the prisoner and counsel decide to file an immediate federal habeas corpus application, counsel will prepare that petition as soon as possible, file it, and represent the prisoner in all further proceedings with respect to it. Such a formal habeas corpus petition will, of course, set forth the prisoner's claims with specificity and thus will be subject to ordinary judicial consideration for form and substance.

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[34] (...continued)
to "risk" forfeiture of currently "unexhausted" claims in later federal proceedings. *Rose v. Lundy*, 455 U.S. 509, 520-21 (1982). *See* Rule 9(b), Rules Governing Section 2254 Cases; *McCleskey v. Zant*, 111 S.Ct. 1454.

[35] There is no occasion in this case to explore the extent to which §848 commits the federal government to compensate counsel for activities on the prisoner's behalf that are focused on obtaining relief from the state courts. We would hope that the state of Texas would underwrite such activities but, in any case, counsel's professional responsibilities exist apart from any promise of reimbursement.

[36] The prisoner in this case was unable to obtain a stay from the Texas courts when he applied *pro se*. We trust that the state courts would be more receptive to a professionally drafted petition that carefully articulates and supports potentially meritorious federal grounds for relief.

III. THE DENIAL OF A STAY WOULD UNDERMINE THE DISTRICT COURT'S JURISDICTION TO DETERMINE THE MERITS OF PROPERLY PRESENTED CLAIMS

The denial of a stay in a case like this would undercut the very substance of the federal courts' jurisdiction in habeas corpus. The proper understanding of older cases has been debated. Yet all sides agree that for the forty years since *Brown v. Allen*, 344 U.S. 443, this Court has read the Habeas Corpus Act to authorize the district courts to examine federal claims after those claims have been rejected in state court. *Wright v. West*, 505 U.S. __, __, 112 S.Ct. 2482, 2488-89 (1992)(opinion for the Court by Thomas, J.).[37]

The importance of habeas corpus in capital cases can be demonstrated quantitatively. The available statistics are incomplete, but it is widely agreed that the success rate in noncapital cases is quite low, perhaps 3-4%.[38] In death penalty cases, by contrast, the success rate is quite high. Between 1976 and 1991, the federal courts found constitutional error warranting habeas relief in approximately 40% of the capital cases they considered. Stated differently, during this period, federal habeas corpus prevented nearly 150 people from being executed on the basis of constitutionally flawed convictions or

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[37] In recent years, this Court has found habeas corpus relief essential to vindicate the rights of prisoners in a variety of circumstances. *E.g.*, *Maynard v. Cartwright*, 486 U.S. 356 (1988)(prosecution under a vague statute); *Amadeo v. Zant*, 486 U.S. 214 (racial discrimination); *Hitchcock v. Dugger*, 481 U.S. 393 (1987)(misinstructed jury); *Francis v. Franklin*, 471 U.S. 307 (1985)(misstatement of the burden of proof); *Estelle v. Smith*, 451 U.S. 454 (1981)(violation of the right to counsel).

[38] *See* Faust, Rubenstein & Yackle, "The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate," 18 N.Y.U. Rev. L. & Soc. Change 637, 681 (1990-91)(providing data from 1973-75 and 1979-81 in the Southern District of New York).

death sentences.[39] These figures demonstrate that constitutional errors occur frequently in capital prosecutions, that the state courts do not routinely detect and cure those errors, and that, accordingly, federal habeas corpus is often the indispensable means by which federal constitutional standards bearing on the death penalty are enforced in the current framework.

To be sure, this Court has recently recognized a variety of procedural rules governing the way in which prisoners must preserve federal claims in state court and then present them in federal court in an efficient manner. Prisoners who fail to observe those procedural rules typically forfeit the access they would otherwise have had to obtain federal adjudication of their federal claims. In *Rose v. Lundy*, 455 U.S. 509, for example, the Court tightened the standards for the exhaustion of state remedies. In *Coleman v. Thompson*, 501 U.S. __, 111 S. Ct. 2546 (1991), the Court elaborated the rules that typically bar federal consideration of any claim a prisoner failed to raise in state court at the time and in the manner prescribed by state law. And, in *McCleskey v. Zant*, 111 S.Ct. 1454, the Court invoked those same rules to force prisoners to join all their claims in a single federal petition. Decisions like *Rose*, *Coleman*, and *McCleskey* establish procedural barriers having the effect, if not the purpose, of limiting the availability of federal habeas corpus for state prisoners.

It is crucial to understand, however, that this Court has repeatedly refused to restrict the substantive scope of the federal courts' habeas jurisdiction.[40] Once a state

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[39] Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 1st Sess. 506-28 (July 17, 1991)(appendix to statement of John J. Curtin, Jr., President of the American Bar Association).

[40] *Stone v. Powell*, 428 U.S. 465 (1976), largely barred the federal ha- (continued...)

prisoner satisfies door-keeping procedural rules, the Court has acknowledged the federal courts' longstanding authority under the Habeas Corpus Act to exercise independent judgment on the merits. In *McCleskey*, 111 S. Ct. 1454, for example, even as the Court raised yet again the procedural barriers to the federal forum, the Court carefully reconfirmed that once a petitioner presents a federal district court with a claim "in the proper procedural manner," the district court must independently determine "all dispositive constitutional claims." *Id.* at 1462.[41]

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[40] (...continued)
beas courts from enforcing the Fourth Amendment Exclusionary Rule. That decision, however, was an interpretation of the Exclusionary Rule itself, not the Habeas Corpus Act. *Withrow v. Williams*, 507 U.S. __, __, 113 S.Ct. 1745, 1750 (1993).

[41] The line of decisions beginning with *Teague v. Lane*, 489 U.S. 288 (1989), has been justified in the same way. The ACLU has warned that the Court's expansive definition of "new rules" for "retroactivity" purposes shades into a general rule of deference to erroneous (but "reasonable") state court decisions applying constitutional law to the facts of particular cases. *E.g.*, Brief *Amicus Curiae* on Behalf of the ACLU and the ACLU of Illinois, in *Gilmore v. Taylor*, 508 U.S. __, 113 S.Ct. 2112 (1993). This Court has recognized, however, that in a long stream of authoritative decisions, it has become "settled" that "mixed" constitutional questions are "subject to plenary federal review" on habeas corpus. *Wright v. West*, 112 S.Ct. at 2489 (opinion for the Court by Thomas, J.)(relying on *Brown v. Allen*, 344 U.S. 443, and quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985)(opinion for the Court by O'Connor, J.)).

Accordingly, the *Teague* cases do not establish any deferential "standard of review" by which the federal habeas courts examine state court judgments regarding federal rights and thus do nothing to undermine the Court's longstanding interpretation of the Habeas Corpus Act to command fresh, independent federal judgment on federal claims. *Wright v. West*, 112 S.Ct. at 2497 (O'Connor, J., concurring). *Accord id.* at 2498 (Kennedy, J., concurring)(explaining that *Teague* is not on a "collision course" with independent federal adjudication in habeas); *id.* at 2501 (Souter, J., concurring)(explaining that *Teague* (continued...)

On occasion, the Court has divided over whether a proposed rule regarding federal habeas is properly understood as a procedural requirement that streamlines the process by which claims are presented, or as a threat to the substantive core of the federal courts' jurisdiction.[42] Yet, when it has been agreed that a rule urged by the state would undercut the very subject matter jurisdiction the federal courts exercise in habeas corpus, the Court has consistently turned the proposed rule away. *E.g.*, *Withrow v. Williams*, 113 S.Ct. 1745. To sustain the federal courts' ability to redress violations of federal law in habeas corpus is only to respect the decision that Congress has made to make the federal courts available for this vital work.[43]

There can be no question that the rule the circuit court announced below would seriously undermine the federal habeas courts' ability to perform their core function. To exercise its habeas jurisdiction, a district court simply must have authority to keep a prisoner alive long enough to consider whatever properly preserved and presented claims the prisoner may have. Concomitantly, a district court must have authority to give an indigent prisoner a lawyer so that the prisoner's initial federal petition can satisfy pertinent procedural requirements.

Frank McFarland does not object to any of the procedural prerequisites this Court has found to be warranted for the protection of state interests. He seeks no dispensation from the exhaustion doctrine in *Rose v. Lundy*, the procedural default rules in *Coleman v. Thompson*, or the successive petition rules in *McCleskey v. Zant*. On the contrary, McFarland seeks only a fair opportunity to *comply* with those procedural rules and for the means by which to do so. Specifically, he asks for a competent lawyer and a little time in which to

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[41] (...continued)
only determines *which* federal legal standard a federal court must apply independently). For an elaboration of these points, *see* Brief *Amicus Curiae* on Behalf of Nicholas deB. Katzenbach, Edward H. Levi, *et al.*, in *Gilmore v. Taylor*, 113 S.Ct. 2112.

Screening habeas corpus petitions for "new rules" only ensures that when a federal district court exercises jurisdiction on the merits, it confines itself to claims that, if resolved against the state, "can invalidate a final judgment." *Keeney v. Tamayo-Reyes*, 504 U.S. __, __, 112 S.Ct. 1715, 1728 (1992)(Kennedy, J., dissenting). *Accord id.* at 1722 (O'Connor, J., dissenting)(characterizing *Coleman*, *McCleskey*, and *Teague* as threshold "hurdles" that a petitioner must clear in order to put a federal claim "properly" before the district court for a determination of the merits).

[42] That happened in *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715. Justice O'Connor's dissent drew a sharp distinction between rules for determining whether a claim is properly before a federal court for decision on the merits (regarding which forfeitures may be legitimate) and rules for determining the manner in which a federal court actually determines the merits (regarding which forfeitures are impermissible). She put the rule at stake in *Tamayo-Reyes* (touching the development of the material facts underlying a federal claim) in the second category. The Court did not reject Justice O'Connor's distinction between the two kinds of rules. Justice White's majority opinion did not quarrel with Justice O'Connor's understanding that *Coleman*, *McCleskey*, and *Teague* are "precondition[s] to reaching the merits . . . ." 112 S. Ct. at 1719 n.3. The majority disagreed with Justice O'Connor only in that, in the majority's view, rules governing procedural default with respect to the development of primary facts fall in the same category as procedural-bar rules -- and not (where Justice O'Connor would put them) in the (forbidden) category of rules that undermine the federal courts' jurisdiction to determine properly presented claims independently.

[43] For a discussion of the statutory basis of the federal habeas jurisdiction and the impropriety of undermining it by judicial decision, *see* Brief *Amicus Curiae* on Behalf of Gerald Gunther, Philip B. Kurland, Daniel J. Meltzer, Paul J. Mishkin, Martin H. Redish, Frank J. Remington, David L. Shapiro, and Herbert Wechsler, in *Wright v. West*, 112 S.Ct. 2482. *See Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. __, __, 112 S.Ct. 560, 564 (1991)(opinion for the Court by Kennedy, J.)(explaining that *stare decisis* has "special force" in cases turning on the interpretation of statutes).

work with that lawyer in the preparation of his petition. In short, he asks only for what Congress has expressly provided that he should receive.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the circuit court and remand with instructions that the district court stay petitioner's execution for the time that court needs to secure appointed counsel and, in addition, for the time appointed counsel needs to investigate this case, to develop all potentially meritorious federal claims and supporting facts, and to prepare and file an effective habeas corpus petition on petitioner's behalf.

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